In the Supreme Court of the United States.

OCTOBER TERM, 1914.

LEWIS E. SMOOT, APPELLANT,
v.
THE UNITED STATES. } No. 208.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The petition herein was dismissed by the Court of Claims.

The suit arose from a contract for the furnishing of "140,200 cubic yards, more or less," of filter sand to be supplied to the Washington Aqueduct filtration plant of the city of Washington, District of Columbia. By the terms of the contract sand was to be deposited in 29 filter beds, and it was provided (Rec., p. 7, par. 29) that "the decision of the engineer in charge as to quality and quantity shall be final," and "no claim should be made for *any extra labor or material* unless required in writing by the party

of the first part or his successors, the prices and quantities having first been agreed upon by the contracting parties and approved by the chief engineer."

Under the first set of specifications submitted for bids the Government required 140,200 cubic yards, more or less, in 29 beds "after settlement with water upon it for one week." These bids were rejected. Under the second advertisement the same specifications were required, but the words "after settlement one week with water and with the filter in operation" were stricken out without the knowledge of the Government consulting engineer, Allan Hazen (Finding IV, Rec., p. 56).

Attention is called to the sequence of the dates hereafter set forth.

On August 1, 1904, appellant was notified to start the delivery.

On January 3, 1905, 15 of the 29 beds having been completed and ready for sand, the Government engineer notified appellant to deliver for these beds 90,936 cubic yards, and appellant replied that he had ample facilities, except under unfavorable weather, for meeting these deliveries and that he had already "*taken steps to build another plant of the same capacity*" (Finding VII, Rec., p. 58).

On February 17, 1905, appellant had only delivered 28,231 cubic yards of sand, and the Government (Finding VIII, Rec., p. 58) notified him by letter that "to enable each of the contractors engaged on the work to prosecute his particular part to the best advantage," * * * a general program had been

devised for deliveries of a certain specified number of cubic yards of sand per month.

On February 24, 1905, appellant commenced the construction of an additional plant and finished it May 30, 1905. This plant, however, was never used, for the reason that on or about March 7, 1905, the Government engineers, solely for appellant's benefit and in no sense as the duty of the Government, devised a scheme of night inspection at the plant, so that appellant could use his original plant running day and night and could thus meet the deliveries required.

When, in October, 1905, the filters were filled to a proper grade and allowance made for settlement, there had been actually furnished 157,725 cubic yards, which was 21,506 cubic yards of sand less than the total of the assumed monthly deliveries stated in the letter of February 17, 1905. Approximately five months previous to this, to wit, May 29, 1905, the Government had informed appellant that it would only require in the aggregate about 157,000 cubic yards.

There are two claims made by appellant. The first for $29,420.20, being the anticipated profits which appellant alleges he would have earned if he had been allowed to supply the said 21,506 cubic yards. The second for the sum of $9,888.04, the net amount claimed for constructing an additional plant and equipment therefor which appellant alleged was required for furnishing an excess quantity of sand.

As to the claim of $29,420.20, the Government maintains that it is not liable for the reason that it never contracted to purchase 179,231 cubic yards, but only sand sufficient to equip the Washington Aqueduct filtration plant. Furthermore, the Government is not liable under the theory of appellant that the total amount claimed by him was substituted for the amount named in the contract, for the reason that the 179,231 cubic yards would have been an excess and meant an increase of cost and was not agreed upon in writing, signed by the parties, and approved by the chief engineer and Secretary of War, as required by the terms of the contract.

As to the claim of $9,888.04, the Government maintains that it is not liable for the reason that the additional plant was not built at the request or because of any act of the Government, nor was it used in furnishing any of the sand supplied under the contract; but on the contrary was built on the initiative of appellant, because having gotten very far behind in his deliveries, he thought he would thus be able to carry out his promises to the Government engineer to deliver sand more rapidly.

ARGUMENT.

Appellee's argument will be presented under the following heads:

First. The Government is not liable for the alleged anticipated profits on the additional cubic yards of sand.

Second. The Government is not liable for the cost of the additional washing and screening plant.

ARGUMENT.

First.

The Government is not liable for the alleged anticipated profits on the 21,506 cubic yards of sand.

The specifications provided for the delivery in place of "140,200 cubic yards of filter sand, more or less." On February 17, 1905, Col. Leach wrote appellant (Finding VIII, Rec., p. 58) that he had laid down a general program of work to be done during each of the months from then on, and set forth in said letter certain cubic yards to be supplied each month as a minimum ~~"unless otherwise ordered."~~ Subsequently, on May 29, 1905, Col. Leach notified appellant that the amount of sand to be supplied (Finding XI, Rec., p. 61) was about 157,000 cubic yards. Did the letter of February 17, 1905, fix the quantity of sand at 179,231 cubic yards, and was the Government liable for the anticipated profits on the difference between 179,231 cubic yards and 157,725 cubic yards, the amount actually furnished?

The status of appellant's position previous to February 17, 1905, should be made clear in order to understand the object of the letter of February 17. He had been delivering sand (Finding III, Rec., p. 56) for a period of approximately six months and a half at the rate of approximately 4,343 cubic yards per month. In other words, at this rate it would have taken approximately 30 months more to supply the 157,725 cubic yards required for the filtration plant. Appellant had already had one year and four months

from the date of the signing of the contract to prepare for deliveries and was given two weeks' notice within which to start delivering, yet he was apparently hopelessly in arrears. It is said that (Finding IX, Rec., p. 60):

> The claimant had been far behind in his work, and as early as the fall of 1904 the Government engineers had been complaining of his insufficient deliveries.

If his work had been divorced from that of the other contractors on the plant, there might not have been so much necessity for hurrying him; but the Government engineers, following the specifications, were attempting to carry on a coordination of work in which if the contractor supplying one part was slow it would hinder all the others. It was for the purpose of hurrying the contractor that the letter of February 17, 1905, was written. This is seen from its opening statement (Rec., p. 58), which says:

> Having in view the systematic and orderly sequence of work on the Washington Aqueduct filtration plant from the present time until its completion, and for the purpose of so regulating its progress as to enable each of the contractors engaged on the work to prosecute his particular part to the best advantage and with the greatest energy, with a minimum of interference by the presence or operations on his ground of other contractors, I have laid down a general program of work.

One has but to turn to specification 298 (Rec., p. 41) to find that the Engineer officer uses almost the

identical language found in said section. Referring to the "*completion*" of the work, it says:

> * * * such a rate of progress will be required as will insure the completion of all the work by the date above named. Any contractor who is awarded one or more classes of work will be required to so conduct his operations as not to materially delay, interfere with, or discommode the work of other contractors, or that which may be done by the United States. The Engineer officer in charge will endeavor to keep such delay or interference down to a minimum, but the fact of unavoidable delay or interference of this kind shall not be made the basis of any claim against the United States. The Engineer officer in charge will make every effort to secure the prompt and timely delivery of all classes of material herein specified to be furnished or placed by the United States. But any delay in furnishing or placing such materials shall not be made the basis of any claim against the United States.

Moreover, it will be seen from the letter of February 17 that the Government's estimate as to the speed at which appellant should deliver in order to keep up with the other contractors was at the rate of 3½ beds a month, or 21,000 cubic yards. Yet he had only been delivering approximately 4,343 cubic yards a month. In view of the requirements put upon the Engineer officer in specification 298, together with the amount of work necessary to be done to keep up with the other contractors, it becomes

obvious why this letter was written. It was a "hurry-up" letter and not one fixing the amount of sand. This becomes even more obvious when the estimates per month are examined. For February and March it was 19,000 cubic yards; April, 18,000; May, 21,000; June, 21,000; July, 21,000; August, 21,000; September, 18,000; and October, 12,000. Every one of the estimates ends in zeros. In other words, if there had been a definite and final estimate made the figures would certainly have been those derived from measurements of the several filter beds, and it would hardly have been within the range of possibility that all of these measurements would have shown amounts ending in each instance in three zeros. Just so with the estimate of 157,000 cubic yards, which was simply the consulting engineer's estimate and not final, as the measurement "in position" demonstrated.

Again, the language of the letter (Rec., p. 59) is that "in the program outlined above the quantity of sand going into each bed has been assumed as 6,000 cubic yards." These are figures estimated as the amount sufficient to keep appellant up to the other contractors. Appellant knew from section 284 (Rec., p. 39) of the specifications that the amount of sand which the Government was liable for would not be determined until the sand was measured in position.

Also, the insertion of a warning as to penalties is responsive to specification 298, *supra*, to hurry the dilatory contractor.

But assuming as appellant does, that the letter of February 17, 1905, did fix the amount of sand, it certainly did not fix it finally. In his very ingenious but sophistical brief, counsel (p. 9) has assumed an incorrect premise which, if accepted by the Government, might lead to trouble. He says:

> For the purpose of this case and to obviate needless discussion, it is conceded that by the terms of the original contract (Rec., pp. 47–51) and the accompanying specifications (Rec., pp. 4–47) *the quantity of sand to be supplied and which the United States agreed to accept was wholly indefinite.* (Italics ours.)

On this premise he attempts to develop his case along the line of *Parish* v. *United States.* (100 U. S., 500.) There the Government entered into a blanket contract with Parish to deliver at several places "the whole amount of ice required to be consumed at each respective point and vicinity during the remainder of the year 1863." This was an order for an indefinite amount. Subsequently, the Government, through its Assistant Surgeon General, sent an order to Parish & Co. directing them to deliver definite amounts at certain cities. At the outset the amount to be delivered was unquestionably wholly indefinite. It was subsequently made definite by the order of the Assistant Surgeon General. Such facts do not square with the situation in the case at bar; for this contract in the first instance called for "*140,200 cubic yards, more or less.*" If it had stopped there the terms of the order would have been indefinite to the extent

of the words "more or less" and 140,200 cubic yards would have been subject to "accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight." (*Brawley* v. *United States*, 96 U. S., 168–172.) But this was an order for the *Washington Aqueduct filtration plant in the city of Washington, D. C.* It was not a blanket order for an unnamed, undefined purpose, but an order for a particular filtration plant of an ascertained size in which everything as to amount was known except the extent of the settlement of the sand after it had been put in place. The plant (spec. 46, Rec., p. 10) was to consist of from 25 to 29 filters. The number of filters was definitely known before February 17 to be 29. These filters were to have net areas of about 1 acre each, and most, if not all, were completed previous to that date. Moreover (spec. 283, Rec., 39) each filter was to have sand in three layers of a foot thick with such an allowance to be made "for settlement as the Engineer officer in charge may direct," and lastly, the final measurement (spec. 284, Rec., p. 39) was to be made *after the sand was in position.* Hence, reading the contract as a whole, the estimate named was thus qualified, and the filtration plant became the ultimate determining factor. The Government maintains that the doctrine to be applied here is set forth in the case of *Brawley* v. *United States, supra.* Mr. Justice Bradley, delivering the opinion, said:

> Where a contract is made to sell or furnish certain goods identified by reference to inde-

> pendent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about," or "more or less," or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. (P. 171.)

And:

> The contract was not for the delivery of any particular lot, or any particular quantity, but to deliver at the post of Fort Pembina 880 cords of wood, "more or less, as shall be determined to be necessary by the post commander for the regular supply, in accordance with Army Regulations, of the troops and employees of the garrison of said post, for the fiscal year beginning July 1, 1871." These are the determinative words of the contract, and the quantity designated, 880 cords, is to be regarded merely as an estimate of what the officer making the contract at the time supposed might be required. (P. 173.)
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> *Watts* v. *Camors & another* (115 U. S., 353–360).

But if we were to accept the position of appellant that 179,231 cubic yards was ordered by the letter of February 17, nevertheless the Government is not

liable for the difference between it and 157,725, for it did not contract for more sand than was required for the filters, and as it has been demonstrated that 157,725 was all that was needed, 179,231 must have been in excess. Under the terms of the contract (sec. 6, Rec., p. 49) any quantity that would increase the cost had to be agreed upon in writing by the engineer in charge and the contractor, and the agreement submitted to and approved by the Secretary of War. An excess over the amount needed would certainly have increased the cost intended under the contract.

The letter of February 17 was written by Col. Leach of the Corps of Engineers, andnot by the Chief Engineer, nor upon his authority. It was not approved by the Secretary of War, nor were the terms therein agreed upon in writing by appellant. Under appellant's theory, therefore, the Government was not liable. (See *Plumley* v. *United States*, 226 U. S., 545–547–548.)

It is of more than passing interest to note that none of the 21,506 cubic yards was prepared for use or delivery to the Government, nor is there any finding that appellant was put to extra expense because of the letter of February 17.

It should be remembered that the increase over 140,200 cubic yards did not come as a surprise to appellant. The subject of shrinkage or settlement as referred to in the specifications (sec. 283) had been discussed with appellant by the Government officials some time previous to the sending of the letter of

February 17 (Finding V, Rec., p. 57). The "1 inch per foot and 1 inch additional" for shrinkage then estimated by Mr. Hazen, the consulting Government engineer, was the amount found to be necessary for settlement.

Again, if the Government only agreed to pay for the quantity of sand required to fill the Washington Aqueduct filtration plant, it would not have been liable for the said excess of 21,600 cubic yards.

Specification 20 (Rec., p. 6) provides:

> It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same.

Recapitulating, the Government maintains that the letter of February 17 did not definitely fix any amount of sand to be supplied; that its purpose was to hurry up the negligent contractor and to keep him apace with the other contractors and thus not delay their work; that this is not like the Parish case, containing a blanket order which became definite only through the letter of the Assistant Surgeon General, for here the contract was for a certain definite and known object; that sand in excess of the amount needed would have increased the cost to the Government; and that not having been agreed to by appellant and approved by the Chief of Engineers and the Secretary of War, the Government can not be held for the same. Finally, the Government was not liable for any excess, for it only agreed to pay for that which was required.

Second.

The Government is not liable for the cost of the additional washing and screening plant.

Appellant claims that the additional washing and screening plant constructed by him was rendered necessary "in order to supply the increased quantity of sand required by the order of February 17, 1905." The situation resultant upon his failure to deliver sand as required by the engineer officer, has already been minutely detailed under the previous heading, and it is therefore not deemed necessary to reiterate the same here. Suffice it to say that appellant in reply to a letter of Col. Leach, wrote on January 5, thirty-three days before the issuance of the letter of February 17 (Finding VII, Rec. 58) "that *he had already taken steps to build another plant of the same capacity* * * *."

The lower court has foreclosed this claim (Finding IX, Rec., p. 60) in the following language:

> At the time of the erection of the duplicate plant it was necessary that deliveries per month should be increased. The claimant had been far behind in his work, and as early as the fall of 1904 the Government engineers had been complaining of his insufficient deliveries. At that time, and on numerous occasions thereafter, the claimant suggested that he expected to erect a duplicate plant, and he frequently promised the Government engineers to build this additional plant so as to increase his output. The construction of

> this duplicate plant was begun and completed in accordance with these promises to the Government engineers and to provide the means of securing increased deliveries.

The Government derived no benefit from the building of this additional plant, nor was the same constructed at its solicitation or request, but on the contractor's own initiative and solely for the purpose of enabling him to fulfill his obligations under the contract.

Moreover, this duplicate plant was never used because, through the efficient action of the Government (Finding IX, Rec., p. 60) an inspection system was devised 11 days after the commencement of the plant and long previous to its completion whereby appellant was enabled to work day and night and thereby catch up with his orders.

At this juncture in his brief appellant's counsel attempts to set aside the court's findings by endeavoring to show inconsistencies therein. His efforts to do so, however, are such as would not indicate that it is necessary to reply thereto, except by way of pointing out a few examples of the sophistry of his contention. For instance (app. brief, pp. 41, 42), he selects the following findings of fact:

> The claimant had been far behind in his work, and as early as the fall of 1904 the Government engineers had been complaining of his insufficient deliveries (Finding IX, Rec., p. 60).

> The duplicate plant was erected to provide for such increased deliveries per month as were necessary under claimant's contract (Finding IX, Rec., p. 61).

Counsel then states that he "will undertake to demonstrate that the foregoing propositions are mere conclusions or inferences in direct conflict with the actual facts found by the court." His argument is that as specification 297 (Rec., p. 41) required him, after notice, to prosecute the work or make delivery with all *due diligence* and at such reasonable rates as might be required by the Engineer officer in charge, that it must be first shown that he was not using such due diligence, which, he asserts, was never done.

By the terms of the contract the Engineer officer was the one to determine whether he had been using due diligence. Attention is called to that part of Finding IX hereinbefore set forth, wherein it is said that "*the Government engineers had been complaining of his insufficient deliveries.*" Certainly the court's finding that the engineers were protesting because of his delays must be accepted as notice that there was a lack of due diligence and disposes of this contention.

Again, he asserts that under the contract he was to be given 30 days' notice, whereas he only had two weeks' notice, within which to begin delivering sand (appellant's brief, p. 42). However, he had had a year and four months previous to August 1, the day for starting to deliver, within which to make prepa-

ration to deliver sand, so that with two weeks' notice it can scarcely be said that he was taken unawares. Moreover, appellant never complained that the notice was insufficient.

Again, he selects (appellant's brief, p. 39) one phrase out of Finding IX (Rec., p. 60) as follows: "There were not sufficient beds in readiness to receive the sand," thus leaving the impression that the Government was dilatory. When the entire finding is read, however, it will be seen that the reason beds were not ready and appellant caught up on deliveries was because of the system of night inspection devised by the Government engineers. Moreover, the finding states that this system "did not fall within their regular duties (Government engineers in charge) and was instituted by them solely for the claimant's benefit and to insure the completion of the filtration plant within the requisite time.

Thus it will be seen that appellant fully intended to build the additional plant because he was behind in his deliveries and had been so informed by the Engineer officer of the Government; that this intention had been repeatedly expressed by him before he received the letter of February 17, and therefore said letter was not the cause for the construction of the additional plant. Hence when the finding states (Finding IX, Rec., 61) that the construction of this duplicate plant was begun and completed in accordance with these promises to the Government engineers and to provide the means of securing increased deliveries it recognizes the fact that appellant's purpose

in building the additional plant was to meet the deliveries urged upon him previous to the letter of February 17. The Government therefore maintains that it is not liable for the cost of the additional washing and screening plant.

Respectfully submitted.

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